IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAM CARMEL,	:	CIVIL ACTION
Plaintiff-Appellant,	:	
v.	:	No. 99-MC-240
CIRCUIT CITY STORES, INC.,	:	
Defendant-Respondent.	:	

MEMORANDUM

ROBERT F. KELLY, J. AUGUST , 2000

The Plaintiff-Appellant, Sam Carmel ("Carmel"), proceeding pro se, has filed a Motion to Vacate the Arbitration Award and/or to Remand to the Arbitrator to Address State Law Public Policy Claims. For the reasons that follow, Carmel's Motion is denied.

I. FACTS.

Carmel was a Circuit City Stores, Inc. ("Circuit City") customer service technician at the Bristol, Pennsylvania repair facility from August 1, 1995 through August 4, 1998. Carmel alleged at arbitration that (1) Circuit City retaliated against him for exercising purely personal rights as a consumer and violating Circuit City's employee handbook and policies;[1] and (2)

[1]On August 4, 1998, Carmel returned a personal electronic organizer to the Circuit City store in Cherry Hill, New Jersey. After waiting approximately 30 to 45 minutes for a replacement from the warehouse, Carmel was informed that the subject model had been discontinued, but he could select another model with a

Circuit City discriminated against Carmel based upon his national origin and a stereotype of Carmel as an aggressive Israeli.[2] The Arbitrator found that there was no basis for Carmel's discriminatory discharge claim because he was an at-will employee and the Handbook did not contain any provisions abrogating the at-will employment relationship or constituting a binding employment agreement. The Arbitrator further found that, even if Carmel did establish a prima facie case of discrimination, the proffered evidence presented a legitimate reason for his discharge and there was no evidence of discrimination.

Specifically, the Arbitrator found that "the decision

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similar cost. The only acceptable replacement cost $20 more than the original model, therefore Carmel requested a cash refund. The customer service employee ("CSR") informed Carmel that he could only get a replacement unit or store credit. Carmel revisited the organizer section and again located a unit that was $20 more expensive. Again, Carmel returned to the counter and requested a refund. According to Carmel, the CSR began to raise his voice and yell at Carmel. Carmel explained that he was unaware of Circuit City's 30-day return policy and indicated that he did not have any extra money with which to purchase the more expensive unit. He therefore returned two days later, on August 6, 1998, and purchased the more expensive organizer. Carmel later admitted that he tried to bargain with the CSR, asking for the more expensive organizer at the same price, but was instead offered the employee discount which amounted to $1. Although he questioned the validity of the discount amount, he accepted it.

[2]Carmel, whose native language is Hebrew, came to the United States in 1989 from Israel, but was born in Poland of Jewish parents. He alleges that, during his employment at Circuit City, employees made derogatory remarks to him concerning his heritage or alienage by calling him a "camel jockey," a fellow technician repeatedly called him "Jew," and on one occasion, someone left a depiction of the Nazi cross, or swastika, on his work bench.

to terminate Carmel's employment was motivated by Carmel's continued violations of the Company's policy concerning treating others with respect. The decision had nothing to do with Carmel's national origin." (Arbitrator's Finding in Supp. of Award at 3, ¶ 4.)[3] Finally, the Arbitrator found that Carmel did not present sufficient evidence of a hostile work environment claim based upon national origin for which Circuit City could be liable.

On November 19, 1999, Carmel filed his Motion to Vacate and/or Remand in this Court, challenging the Arbitrator's ruling on the various employment-related legal disputes which he had

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[3]At the arbitration, Tony Primm, the Circuit City regional service manager, related that Carmel's employment "was terminated due to our treating associates with respect policy, not due to his actual work performance as a technician." N.T. at 363. Specifically, Carmel was verbally coached by his supervisor, Steve Sutton, about "a[n April, 1997] flare up with the parts department." Id. at 331, 334-335. Thereafter, in August, 1997, "Sam got into an altercation with the inside technical manager, Sharon Haines." Id. at 337. In December, 1997, Carmel "had an altercation with the parts department. . . .Our regional parts manager was up doing a visit and there was a problem there once again. She [Deborah Fletcher] went to Mr. Sutton and he came to me and a document was prepared and we went through the same process again." Id. at 341. Then, in April, 1998, "He [Carmel] called up a store in Allentown and talked to a CSR there. . . .and the CSR found him to violate our treat an associate with respect policy. She was upset and the operations manager contacted me." Id. at 344.

Primm and Sutton took corrective action with Carmel after each incident. After the April, 1998 corrective action, Carmel was advised that further disciplinary action and termination could follow. Id. at 349. The August 4, 1998 incident finally precipitated Carmel's termination.

arbitrated with Circuit City. Carmel's Motion was the initial pleading in this case and was purportedly served upon Circuit City by mailing copies of the document via the United States Mail both to the attorney who had represented Circuit City at the arbitration and to Circuit City's Corporate Counsel. In correspondence dated July 7, 2000, this Court requested that Circuit City respond to Carmel's Motion. Circuit City filed its Opposition to Carmel's Motion on July 21, 2000.

II. STANDARD.

The grounds for vacating an arbitration award are set forth in the Federal Arbitration Act ("FAA") and are extremely limited as follows:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Moreover, "[w]here an award is vacated and the time within which the agreement required the award to be made has

not expired the court may, in its discretion, direct a rehearing by the arbitrators. Id. at § 10(a)(5). A court may also vacate an award "if the arbitrators 'manifestly disregarded the law.'" Kennington, Ltd., Inc. v. Wolgin, No. CIV.A.97-7492, 1998 WL 221034, at *2 (E.D. Pa. May 6, 1998)(citing Virgin Islands Nursing Ass'ns v. Schneider, 668 F.2d 221, 223 (3d Cir. 1981)).

III. DISCUSSION.

Carmel states that "by ignoring the heart of [his] legal argument, the arbitrator so imperfectly executed her responsibilities that a final and definite award upon the subject matter was not made. The award also showed evident partiality under Section 10 of the Act." (Carmel Certification at 1, ¶ 3.) In addition, Carmel alleges that the Arbitrator showed evident partiality "by failing to require Circuit City to respond to important discovery questions regarding individuals terminated for conduct unrelated to employment. In this case, I was terminated for attempting to forcefully assert important consumer statutory rights and my constitutional rights to free speech." Id. Further, Carmel contends that Circuit City's stated reason for termination was a pretext; the true reason was a mixed motive of attempting to retaliate against him for asserting his rights as a consumer, and national origin discrimination against him because of the perception of him as an aggressive Israeli.

A. Failure to Comply with Local Rule of Civil Procedure 5.1(b) and the FAA Service Provisions.

Circuit City first objects to Carmel's Motion to Vacate and/or Remand on the basis that Carmel has not complied with Local Rule of Civil Procedure 5.1(b).[4] Circuit City also objects to Carmel's Motion because it does not comply with the service rules of the FAA. 9 U.S.C. § 12. Section 12 of the FAA provides that a "[n]otice of a motion to vacate . . . must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Id. In addition, the Federal Rules of Civil Procedure govern the service requirements in the United States District Courts. FED. R. CIV. P. 1. Federal Rule of Civil Procedure 4 establishes the proper method of service of a summons and complaint, notifying a party that a lawsuit has been filed and detailing the party's obligation to respond. FED. R. CIV. P. 4. The section of the Rule regarding service on corporations such as Circuit City provides:

> [u]nless otherwise provided by federal law, service upon a domestic or foreign corporation . . . shall be effected . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

[4]Local Rule of Civil Procedure 5.1(b) provides: "Any party who appears pro se shall file with the party's appearance or with the party's initial pleading an address within the district where notices and papers can be served."

FED. R. CIV. P. 4(h). Rule 4 also provides that

> [t]he summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief requested in the complaint.

FED. R. CIV. P. 4(a).

Circuit City claims that none of its agents authorized to accept service has ever been properly served with a notice of this action meeting these requirements. Rather, Circuit City claims that it received, via mail, a copy of a cover letter from Carmel to this Court dated November 19, 1999, a copy of the Motion to Vacate, and related documents. None of the documents contained a case number, the date of filing, or notice to Circuit City of its obligations to respond as required by Federal Rule 4. According to Circuit City, Carmel has failed to provide Circuit City with adequate notice of the proceeding in the manner provided by the rules of this Court and Carmel's Motion should be dismissed for Carmel's failure to serve Circuit City with notice of his Motion within three months of the date of the arbitration. 9 U.S.C. §§ 10, 12. For these procedural reasons alone, this Court can dismiss Carmel's Motion. However, the merits of Carmel's Motion will be examined.

B. Substantive Issues.

According to Circuit City, even if this Court considers the merits of Carmel's Motion to Vacate, Carmel completely fails to establish grounds sufficient to vacate the arbitration award. Only the grounds set forth in section 10 of the FAA may be considered as a possible basis for vacating an arbitration award, and the party seeking to upset the arbitration award bears the burden for establishing those grounds. Perna v. Barbieri, No. CIV.A.97-5943, 1998 WL 181818, at *2 (E.D. Pa. Apr. 16, 1998), aff'd, 176 F.3d 472 (3d Cir. 1999). Carmel relies on three arguments to support his attempt to reverse the arbitration award: (1) "evident partiality" by the Arbitrator; (2) "misconduct" by the Arbitrator; and (3) "imperfect execution" by the Arbitrator of her powers. 9 U.S.C. §§ 10(a)(2)-(4). Circuit City responds to each argument.

1. No "Evident Partiality" by the Arbitrator.

The basis for Carmel's "evident partiality" argument is that the Arbitrator ruled adversely against him on his discovery request and failed to respond to "the heart of his legal argument," including his claims involving his consumer and free speech rights. As Circuit City notes, "[i]n order to show 'evident partiality,' 'the challenging party must show "a reasonable person would have to conclude that the arbitrator was partial" to the other party in the arbitration.'" Bender v.

Smith Barney, Harris, Upsham & Co., Inc., 901 F. Supp. 863, 867 (D. N.J. 1994), aff'd, 67 F.3d 291 (3d Cir. 1995)(citing Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1523 n.30 (3d Cir. 1994)(quoting Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989))). The challenging party must show an underlying conflict such as a substantial business relationship between an arbitrator and a party to the litigation. Id. at 868. Here, Carmel has not shown any conflict such as a substantial business relationship between the Arbitrator and Circuit City. Thus, Circuit City correctly argues that Carmel has failed to provide any evidence that is "powerfully suggestive of bias" and sufficient to allow this Court to vacate the arbitration award.

2. Carmel Has Not Established that the Arbitrator Was "Guilty of Misconduct."

Carmel also requests vacation of the arbitration award because the Arbitrator was "guilty of misconduct" for failing to address his consumer and free speech rights in a meaningful way. As Circuit City notes, misconduct has been defined as "not bad faith, but 'misbehavior though without taint of corruption or fraud, [if] . . . born of indiscretion." Newark Stereotyper's Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.), cert. denied, 393 U.S. 954 (1968)(quoting Stefano Berizzi Co. v. Krausz, 239 N.Y. 315, 317, 146 N.E. 436, 437 (1925)(Cardozo, J.)). The appearance, however, that an arbitrator failed to consider a party's arguments, without

establishing that the party's rights were somehow prejudiced, does not constitute the sort of misbehavior that gives rise to a finding of misconduct on the part of the arbitrator. See Maiocco v. Greenway Capital Corp., No. CIV.A.97-MC-0053, 1998 WL 48557, at *5 n.7 (E.D. Pa. Feb. 2, 1998)(citing Newark Stereotyper's Union, 397 F.2d at 599). Thus, Carmel fails to show how he was prejudiced, since the arbitration award addressed each of his claims and arguments.

3. Carmel Has Not Established That The Arbitrator "Imperfectly Executed Her Responsibilities."

Finally, Carmel asks this Court to vacate the arbitration award because he claims the Arbitrator "imperfectly executed her responsibilities" by "ignoring the heart of his legal argument" so that a final and definite award on the subject matter was not made. To establish error on the part of the Arbitrator, Carmel must show that the award is tainted by "an omission or refusal to make a finding." Gonzalez v. Shearson Lehman Bros., Inc., 794 F. Supp. 53, 55 (D. Puerto Rico 1992)(quoting Air Line Pilots Ass'n Int'l v. Aviation Assocs., Inc., 955 F.2d 90, 94 (1st Cir. 1992)).

Circuit City argues that Carmel has "cited no omissions in the arbitration award nor refusals on the part of the arbitrator to make a finding." Def.'s Mot. at 9. Instead, Carmel simply states that the Arbitrator "ignored the heart of his legal argument." Id. Carmel fails to show that the

arbitration award is marred by an omission or refusal by the Arbitrator to make a finding. Thus, Carmel fails to show that the Arbitrator imperfectly exercised her powers.

IV. CONCLUSION.

Although Carmel may be unhappy with the Arbitrator's decision, this Court cannot set aside the decision "unless there is a specific statutory ground for doing so. These grounds do not include the correctness of the decision." Perna, 1998 WL 181818, at *3. For all of the above reasons, Carmel's Motion is denied.

An Order follows.

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Defendant-Respondent.	:	

ORDER

AND NOW, this day of August, 2000, upon consideration of Sam Carmel's Motion to Vacate and/or remand the Arbitrator's Decision, and Circuit City Stores, Inc.'s Response thereto, it is hereby ORDERED that the Motion is DENIED and the case is DISMISSED. The Clerk of Court is ORDERED to mark this case CLOSED.

BY THE COURT:

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Robert F. Kelly, J.